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In The

Supreme Court of the United States

October Term, 1998

RITA GLUZMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF OF *AMICUS CURIAE* THE CATO INSTITUTE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF THE *AMICUS*

Amicus Curiae, the Cato Institute, respectfully submits this brief in support of the petition for writ of certiorari to the Second Circuit.[1] The Cato Institute is a nonpartisan public policy research foundation dedicated to individual liberty, free markets, and limited, constitutional government. To further those ends, Cato Institute scholars have published numerous works discussing the importance of the constitutional doctrine of enumerated powers in our federal system and, in particular, the proper scope and limits of national power under the Commerce Clause (U.S. Const. art. I, § 8, cl. 3). *E.g.*, Pilon, *Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles*, 68 NOTRE DAME L. REV. 507 (1993); Reynolds, *Kids, Guns, and the Commerce Clause: Is the Court Ready for Constitutional Government?* CATO INSTITUTE POLICY ANALYSIS NO. 216, Oct. 10, 1994; Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167 (1996).

Amicus Curiae has a substantial interest in supporting the petition for certiorari because the appellate court's decision upholding a federal criminal statute governing "interstate domestic abuse," 18 U.S.C. § 2261(a)(1), conflicts with this Court's ruling in *United States v. Lopez*, 514 U.S. 549 (1995), and will, if left standing, permit Congress to regulate wholly non-commercial criminal conduct,

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

including all manner of street crime, thus usurping the traditional authority of states and localities over their own domestic law enforcement, with profound long-term consequences for liberty and limited government in the United States. This brief will discuss some of the consequences of overriding constitutional restraints to allow Congress a general police power over non-commercial crime.

SUMMARY OF THE ARGUMENT

The Opinion of the Court and the concurring opinions in *United States v. Lopez*, 514 U.S. 549 (1995), establish that only commercial activities are subject to Congress's authority under the Commerce Clause. Despite that restriction, the Second Circuit in the present case upheld a criminal statute that governs the wholly non-commercial conduct of spousal abuse, relying on the fact that the statute also requires incidental interstate travel. The ruling below ignores the limitations inherent in the plain language of the Commerce Clause, and also conflicts with the restrictions of the Domestic Violence Clause (art. IV, § 4), which permits the national government to address violence within a state only upon petition from the endangered state.

If allowed to stand, the Second Circuit's ruling will undermine the local control and accountability that the Framers intended for the dangerous powers of law enforcement, and will threaten individual rights by permitting federal authorities to circumvent the rights of

citizens under their own states' laws, while also eviscerating the doctrine of enumerated powers – liberty's first line of defense against an overweening central government.

ARGUMENT

I. THE SECOND CIRCUIT INCORRECTLY RULED THAT THE COMMERCE CLAUSE GIVES CONGRESS POWER OVER THE WHOLLY NON-COMMERCIAL CRIMINAL CONDUCT OF DOMESTIC ABUSE

A. *Lopez* Held That Congress May Regulate Only Commercial Activities Under The Commerce Clause

In *United States v. Lopez*, 514 U.S. 549 (1995), this Court held that Congress's power "to regulate Commerce * * * among the several states" (U.S. Const. art. I, § 8, cl. 3), reaches only *commercial* activities, which may be interpreted to include a variety of economic undertakings but cannot be unleashed from the moorings of the operative word "commerce" to cover all manner of human conduct outside the realm of business and trade, and on that basis struck down a statute making it a federal crime to possess a gun in a school zone, 18 U.S.C. § 992(q). As explained below, the central holding of *Lopez* – that Congress's power under the Commerce Clause must at least be restricted to *commercial* activity – animates the majority opinion of Chief Justice Rehnquist and the concurring opinions of Justices Kennedy and Thomas. But the Second Circuit's ruling in the present case expands the

bounds of the Commerce Power beyond commercial activities and thereby guts this Court's ruling in *Lopez*.

1. The Opinion of the Court

In the Opinion of the Court in *Lopez*, Chief Justice Rehnquist wrote: "We start with first principles. The Constitution creates a Federal Government of enumerated powers." 514 U.S. at 552. Quoting James Madison, " '[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.' " *Id.* (quoting THE FEDERALIST NO. 45, at 292-293 (C. Rossiter ed. 1961)). Thus, " '[u]nder our federal system, the administration of criminal justice rests with the States except as Congress, acting within the scope of [its] delegated powers, has created offenses against the United States.' " 514 U.S. at 561 n. 3 (quoting *Screws v. United States*, 325 U.S. 91, 109 (1945) (plurality opinion)).

The commerce power delegated to Congress " 'is the power to regulate; that is, the power to describe the rule by which *commerce* is to be governed.' " 514 U.S. at 553 (quoting *Gibbons v. Ogden*, 9 Wheat. 1, 196, 6 L.Ed. 23 (1824)) (emphasis added). Whatever other limits may exist,[2] any criminal statute passed under the commerce power must be shown at least to govern *commercial* activity if it is to pass constitutional muster; thus, in *Lopez* this Court struck down the Gun-Free School Zones Act

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[2] Other limits on the Commerce Power are discussed in, for example, Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987).

because "Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." 514 U.S. at 561.

In striking down the Act, the Court specifically rejected the contention of dissenting Justice Breyer that "commerce" is a broad and amorphous term, and that therefore "Congress could rationally conclude that schools fall on the commercial side of the line" because they provide children with training to participate in the workplace and thereby affect commerce. *Id.* at 565. According to the Court, "Justice Breyer's rationale lacks any real limits because, depending on the level of generality, any activity can be looked upon as commercial;" for example, family law and child rearing could be said to have the same potential to affect commerce through the future productivity of children. *Id.* at 565-566. The Court then acknowledged its responsibility to determine, on a case-by-case basis, whether a given subject of congressional regulation is indeed "commercial" in order to restrict Congress to "those powers enumerated in the Constitution." *Id.* at 566.

2. The Concurring Opinions

The concurring opinions in *Lopez* placed even greater emphasis on the touchstone of the Court's ruling – that only commercial activities are subject to Congress's authority under the Commerce Clause. For example, Justice Kennedy stressed that "the essential principles now in place" recognize "the congressional power to regulate transactions of a *commercial nature*." *Id.* at 574 (Kennedy,

J., concurring) (emphasis added). Justice Kennedy explained that the Framers intended the states to have exclusive power over their customary areas of responsibility (such as schools, families, and crime) to assure that citizens would have some means of knowing whom to hold accountable for failure to perform a given function, and therefore stressed that the commerce power delegated to Congress should not be interpreted so broadly as to intrude in those areas:

> Were the Federal Government to take over the regulation of entire areas of traditional state concern, *areas having nothing to do with the regulation of commercial activities*, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory. The resultant inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power.

Id. at 577 (citations omitted) (emphasis added). Thus, according to Justice Kennedy, a statute passed under the Commerce Clause cannot stand "unless Congress can * * * demonstrate its *commercial character*." *Id.* at 580 (emphasis added).

Likewise, in his concurring opinion, Justice Thomas emphasized that, at the very least, Congress must be limited to addressing activities of a commercial character under the commerce power:

> Notwithstanding Justice Souter's discussion [in dissent], 'commercial' character is not only a natural but an inevitable ground of *Commerce* Clause distinction. Our invalidation of the Gun-

> Free School Zones Act therefore falls comfortably within our proper role in reviewing federal legislation to determine if it exceeds congressional authority as defined by the Constitution itself.

Id. at 601 n. 9 (citations omitted) (emphasis in original).

B. The Domestic Violence Clause Requires That Congress Act Only Upon Petition From A State Seeking Protection Against Domestic Violence

The reach of § 2261(a)(1) of the Violence Against Women Act must be retracted not only to vindicate the plain language of the Commerce Clause, but also to abide by the limitations inherent in the Domestic Violence Clause of Article IV, Section 4, which provides: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and *on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.*" (Emphasis added).

Recent scholarship has revealed that in the Framers' understanding, "[e]very pretext for intermeddling with the domestic concerns of any state, under colour of protecting it against domestic violence is taken away, by that part of the provision [art. IV, § 4] which renders an application from the legislative, or executive authority of the state endangered, necessary to be made to the federal government, before it's [sic] interference can be at all proper." Bybee, *Insuring Domestic Tranquility: Lopez, Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 GEO. WASH. L. REV. 1, 4 n. 13 (quoting

St. George Tucker, Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the federal Government of the United States; and of the Commonwealth of Virginia app. at 367 (photo. reprint 1996) (1803)). The Domestic Violence Clause thus reinforces the principle already inherent in the enumeration of powers in the Constitution – that Congress, in enacting criminal legislation, must confine itself to subjects within its specifically delegated powers to avoid intermeddling in the domestic affairs left for the states to address.

C. The Second Circuit Has Jettisoned The Restriction Of Commerce-Clause Legislation To Commercial Activity

Despite the restrictions inherent in the Commerce Clause, as understood through the doctrine of enumerated powers, the Second Circuit in the present case upheld a criminal statute – purportedly passed under the commerce power – that governs conduct as far removed from commercial activity as can be imagined, namely, "crime[s] of violence" causing "bodily injury" to a "spouse or intimate partner." 18 U.S.C. § 2261(a). While it may be true, as the Court noted in *Lopez*, that "depending on the level of generality, any activity can be looked upon as commercial," it would render the language of the Commerce Clause – and the doctrine of enumerated powers – a nullity to interpret commerce so broadly as to include spousal violence, just as it would to include possession of a gun in a school zone. 514 U.S. at 565-566.

The Second Circuit in the present case relied on the District Court's reasoning that Congress has "plenary

power" to regulate "the channels of interstate commerce," and therefore can properly reach wholly non-commercial activities such as spousal abuse through its commerce power, as long as some element of interstate travel is involved. *See* Pet. App. at 2a, 15a. But that reasoning conflicts with the central holding of *Lopez*, set forth in the Opinion of the Court and in the concurrences, that the *Commerce* Clause must at least be restricted in scope to *commercial* activity; the Court nowhere stated that the commercial focus of the power can be ignored whenever a state line is incidentally crossed.[3] The Second Circuit has nevertheless ruled that there are effectively no limitations on the subject areas Congress can reach under its commerce power, no matter how deeply its legislation may intrude into the customary realm of state and local sovereignty. That ruling, as explained below, threatens

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[3] In one of the broadest extensions of the commerce power, this Court upheld the Mann Act, governing interstate transportation of women and girls for "immoral purposes," but that statute, while broadly worded, was primarily directed at a commercial activity, the selling of sexual services, then known as "the White Slave Traffic." *Hoke v. United States*, 227 U.S. 308 (1913). In an opinion more than eighty years ago, the Court later upheld the use of that statute to punish an individual for transporting a woman to make her "his mistress and concubine" – a non-commercial activity that now appears beyond the scope of the Commerce Clause as interpreted in *Lopez*. *Caminetti v. United States*, 242 U.S. 470 (1917). Despite that incidental application, the fact remains that the Mann Act was primarily focused on commercialized vice, and therefore stretches the reach of the Commerce Clause far less than the domestic abuse statute at issue here, which has nothing at all to do with commerce.

the principles of liberty, limited government, and federalism embedded in the Constitution.

II. THE SECOND CIRCUIT'S RULING THREATENS THE SAFEGUARDS OF FEDERALISM AND INDIVIDUAL RIGHTS

A. Federal Intrusion Into Routine Law Enforcement Undermines The Local Control And Accountability Intended By The Framers.

The Court in *Lopez* stressed that the administration of criminal justice under our federal system lies within the States unless Congress, pursuant to its delegated powers, creates a federal offense. 514 U.S. at 561 n. 3. As one legal scholar recently noted in discussing the primacy of state authority over crime, "federalism is likely to be *more* important to the liberty and well being of the American people than any other structural feature of our Constitution, including the separation of powers, the Bill of Rights, and judicial review." Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 756 (1995) (emphasis in original).

State and local governments, because of their smaller size and greater proximity to the citizens they police, can be more easily monitored and may be able to enforce the law less intrusively than the federal government could:

> [I]t often makes sense to lodge dangerous and intrusive police powers over crime and other controversial social issues in the states, where government officials may be monitored more easily by the citizenry. Conversely, state governments also may find that they are able to enforce

> criminal laws and regulations of social mores less coercively than the national government because of the lower costs and greater ease of monitoring citizen behavior in a smaller jurisdiction.

Id. at 778.

Moreover, state and local governments by their nature will be more responsive to local tastes, priorities, and conditions than the national government, and therefore better able to work within communities in implementing anti-crime strategies. *Id.* at 775. Indeed, the Police Executive Research Forum has criticized the trend of federalizing routine crime because it "diverts federal authorities from what they do best and puts more distance between law enforcers and local community residents – in direct conflict with community policing objectives." Police Executive Research Forum, *Position on Federalism*, quoted in, AMERICAN BAR ASS'N, TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW (1998) at 41 n. 72; *see also*, *Lopez*, 514 U.S. at 682 (Kennedy, J., concurring) ("injection of federal officials into local problems causes friction and diminishes political accountability of state and local governments") (citing Brief for National Conference of State Legislatures as *Amicus Curiae* 26-30).

Finally, as the "laboratories of democracy," state and local governments can experiment with alternative approaches to crime control, and competition among states can encourage innovation and efficiency, but that process will be short-circuited if the national government, unleashed from its enumerated powers, imposes uniformity through centralized command-and-control. *Lopez*,

514 U.S. at 1641 (Kennedy, J., concurring) ("the statute now before us forecloses the States from experimenting and exercising their own judgment in an area to which states lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of the term").

The "interstate domestic abuse" statute at issue in the present case implicates many of the problems with federalizing crimes traditionally subject to state control. "Domestic violence is an exceedingly complex problem, presenting many unique challenges," so states have developed multifaceted resources and mechanisms to address the problem, including civil protection orders, tort remedies, criminal statutes, and child-custody provisions. *See* Klein and Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 810 (1993). Experts stress that domestic violence requires a "coordinated community response" from local authorities, linking county prosecutors, local police and sheriffs, social service agencies, housing assistance agencies, and others in coherent and consistent strategies to punish offenders and provide for the needs of the victims. Griffith, *Lessons in Collaboration from Local Domestic Violence Councils*, 33 WILLIAMETTE L. REV. 931, 934-938 (1997). Prosecution and incarceration of the offenders can play a critical role, but selecting the response best for the victims is complicated by the fact that victims are often economically dependent on the perpetrators, and may end up destitute or homeless if suddenly cut off from financial support. Klein and Orloff, *supra*, 21 HOFSTRA L. REV. at 990-1004.

Federal agents and prosecutors are an alien and potentially disruptive presence in this area of comprehensive state authority; indeed, one commentator who applauds the contribution of federal funds to efforts to address domestic violence has nevertheless criticized the accompanying federal criminal statutes because of pessimism about "the ability of federal law enforcement to do the kind of on-site policing that the federal criminal system has never been any good at." Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1516 at n. 38 (1998). While "[f]ederalizing domestic violence crimes caters to public sentiment to 'get tougher,' " in the end "it is likely to distract attention away from local law enforcement, duplicating and wasting resources and not much else." *Id.* In blurring the lines of governmental responsibility for prosecuting domestic abuse, federal legislation could potentially exacerbate the problems of neglect and lack of accountability that critics have found in the response of some state and local authorities. *E.g., id.* at 1506. And the local U.S. Attorney and federal agents, unlike the county prosecutor and sheriff, never have to stand for election by the people they serve, so their neglect and errors are not subject to electoral accountability.

Those problems illustrate the wisdom of the Framers in leaving crime control generally in the hands of state and local governments, subject only to narrow incursions of federal power to address truly national problems, for which Congress has been delegated specific authority. The Commerce Clause should not be stretched beyond its bounds – as the Second Circuit has stretched it – to

swallow up traditional areas of state authority such as domestic abuse.

B. Federal Duplication Of State Criminal Codes Threatens Individual Rights.

The passage of the federal statute governing "interstate domestic abuse" is part of a trend in which Congress has been duplicating state offenses in the federal criminal code, particularly on "hot-button" issues suitable for political posturing. See AMERICAN BAR ASS'N, TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW (1998) at p. 2. That expansion of federal authority into areas the Framers never intended undermines many aspects of the constitutional structure they designed, throwing the system out of balance in ways that threaten individual rights and liberty.

For example, the Framers of the Bill of Rights intended that no person should "be subject for the same offence to be twice put in jeopardy of life or limb," meaning that a person cannot be punished twice or prosecuted after an acquittal for the same crime. U.S. Const. amend. V. But this Court has ruled that a state prosecution will not bar a subsequent federal prosecution for the same conduct, because the state and federal governments are "separate sovereigns" with distinct interests to protect. *Abbate v. United States*, 359 U.S. 187 (1959). The "separate sovereign" doctrine would not often compromise the constitutional protection against double jeopardy if the federal government were restricted to its enumerated powers and created federal crimes only to address the genuinely national issues within its authority.

But the duplication of state criminal codes, exemplified in the "interstate domestic abuse" statute, threatens to render double-jeopardy protections meaningless.

Moreover, the federalization of state crimes may deprive the accused of rights and procedural protections afforded by state law but not applicable in federal prosecutions. For example, states may provide broader protections against entrapment, broader rights to pretrial discovery, and even a broader right to counsel. *See* KAMISAR, LAFAVE, AND ISRAEL, MODERN CRIMINAL PROCEDURE 49, 392-97, 1128-36 (7th ed. 1990). Federal duplication of state criminal codes creates the potential for those rights and protections to be circumvented by the simple expedient of prosecution in federal rather than state court. Indeed, the Petitioner in this case has cited evidence that she was prosecuted in federal court in part so that New York's requirements for corroboration of accomplice testimony could be avoided. Pet. at p. 24.

But perhaps most importantly, the demise of the doctrine of enumerated powers would leave all individual rights in jeopardy because it would eliminate the Constitution's first line of defense against an overweening central government. The Bill of Rights was added to the Constitution as a "back-up" system, but the primary protection was meant to reside in the enumeration and hence limitation of powers. As one scholar has noted, "[t]here is no reason to believe * * * that the Bill of Rights itself will survive over the long term if the rest of the plan is abandoned. As National Aeronautics and Space Administration engineers say, once you start relying on the backup systems, you are already in trouble." Reynolds, *supra*, CATO INSTITUTE POLICY ANALYSIS NO. 216, Oct. 10,

1994, at p. 28. The Second Circuit's ruling in this case threatens to unleash the national government from the doctrine of enumerated powers, leaving the Bill of Rights as the only restraint on central power. Sooner or later, that restraint is bound to fray and break.

CONCLUSION

This Court should grant the petition for certiorari and reverse the Second Circuit's decision.

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